SUPREME COURT
OF THE
UNITED STATES

OCTOBER TERM, 1943

No.....

THE WASHINGTON WATER POWER COMPANY, a corporation, THE CITY BANK FARMERS TRUST COMPANY, a corporation, and RALPH E. MORTON, as Trustee, STEVENS COUNTY, WASHINGTON, and FERRY COUNTY, WASHINGTON,

Petitioners,

vs.

UNITED STATES OF AMERICA.

Brief in Support of Petition for Writ of Certiorari

OPINIONS OF THE COURTS BELOW

The ruling of the District Court for the Eastern District of Washington, Northern Division, by reason of which that Court sustained the objections to each and all of the offers of proof by petitioner, The Washington Water Power Company, is set forth in the reported opinion of *United States vs. The Washington Water Power Company,* 41 F. Supp. 119. It is set forth on pages 116-132 of the Record.

The opinion of the trial Court upon which he predicated the instructions to the jury to bring in verdicts for Stevens County and Ferry County for the amount of the taxes levied in 1939 and the interest thereon is not printed in any report, but is set forth on pages 115 and 116 of the Record.

The opinion of the United States Circuit Court of Appeals for the Ninth Circuit, reported in 135 Fed. (2d) 541, upon which that Court entered the decree

here sought to be reviewed, which modified the judgment of the District Court by striking therefrom the judgments of Stevens and Ferry Counties and affirming the judgment as modified, is set forth in the Record at pages 332-338.

Jurisdiction

The jurisdiction of this Court is invoked under Judicial Code Section 240 amended, Title 28 U.S.C. Section 347 (a). (Mar. 3, 1891, c. 517, §6, 26 Stat. 828; Mar. 3, 1911, c. 231, §240, 36 Stat. 1157; Feb. 13, 1925, c. 229, §1, 43 Stat. 938; Jan. 31, 1928, c. 14, §1, 45 Stat. 54; June 7, 1934, c. 426, 48 Stat. 926)

The date of the decree of the United States Circuit Court of Appeals for the Ninth Circuit, which it is here sought to have reviewed, is April 30, 1943 (R. p. 338).

A statement of the grounds upon which the jurisdiction of this Court is invoked is set forth in the preceding petition, pp. 4 to 8, to which statement, reference is here made for the sake of brevity.

Cases believed by petitioners to sustain the jurisdiction of the Supreme Court of the United States and relied on for the exercise of said jurisdiction are:

S. S. Ansaldo San Giorgio I vs. Rheinstrom Bros. Co., 294 U. S. 494, 79 Law. ed. 1016, 55 S. Ct. 483.

United States vs. Miller, 317 U. S. 369, 87 Law. ed. (Adv.) 251, 63 S. Ct. (Adv.) 276.

The United States of America Upon the Relation and for the Use of the Tennessee Valley Authority,

Petitioner, vs. W. V. N. Powelson, Assignee and Successor in Interest of Southern States Power Company, et al., 318 U. S. ....., 87 Law. ed. (Adv.) 976.

Assignments of Error

I. The Circuit Court of Appeals erred in modifying the judgment of the District Court by striking therefrom the judgments in favor of Stevens and Ferry Counties.

II. The Circuit Court of Appeals erred in entering a decree affirming the judgment of the District Court as modified, thereby depriving The Washington Water Power Company, one of the petitioners herein, of the property without paying therefor the market value which can be fairly determined.

Petitioners, by their counsel, hereby specify each and both of the aforesaid assignments of error, in their entirety, as the assigned errors intended to be urged, the first of said assignments of error is made in connection with the tax questions set forth on pages 8 and 9 of the petition, and the second of said assignments of error is made in connection with the question re "market value which can fairly be determined" set forth on page 8 of the petition.

STATEMENT OF THE CASE

For the sake of brevity, we refer to the statements in the preceding petition re: Summary Statement of the Matter Involved (Petition, pp. 2, 3) and Nature of the Case and of the Rulings of the Court (Petition, pp. 5-8).

ARGUMENT

The decison sought to be reviewed is in conflict with those opinions of this court which hold the United States when condemning property must pay "market value fairly determined."

The decision of the District Court, as affirmed by the Circuit Court of Appeals, is in conflict with decisons of this Court in that it denies the defendants the right to just compensation for their property, by denying them the right to prove "the highest and most profitable use for which the property is adaptable and needed or likely to be needed in the reasonably near future."

Olson vs. United States, 292 U. S. 246, 255, 78 Law. ed. 1236, 54 S. Ct. 704.

Other opinions of this court which are in conflict with the decision in the case at bar are:

U. S. vs. Chandler-Dunbar Water Power Co., 229 U. S. 53, 57 Law. ed. 1063, 33 S. Ct. 667.

Mississippi & Rum River Boom Co. v. Patterson, 98 U. S. 403, 25 Law. ed. 206.

U. S. vs. Miller, 317 U. S. 369, 87 Law. ed. (Adv.) 251.

U. S. ex rel Tennessee Valley Authority vs. Powelson, 318 U. S. ...., 87 Law. ed. (Adv.) 976.

The question here presented is whether the government in taking these lands in connection with construction of the Grand Coulee Dam project, could, as an incident of that taking, deny the defendants the right to develop them as a power site and thus make impossible their use for such purpose, so that that

use may not be considered in determining their fair market value, even tho such value had existed and been recognized on the "market" at the time of the taking.

In the *U. S. vs. Chandler-Dunbar Water Power Co.*, 229 U. S. 53, 57 Law. ed. 1063, the government condemned land owned by the company at Sault St. Marie, Michigan.

The company claimed that one parcel of land was valuable for canal and locksite purposes, even tho the operation of the canal and locks involved the use of the waters of the Sault St. Marie River, a concededly navigable stream. This value the Supreme Court allowed because it was reasonably probable that such use would be made of the lands in the reasonably near future.

> "That this land had a prospective value for the purpose of constructing a canal and lock parallel with those in use had passed beyond the region of the purely conjectural or speculative. That one or more additional parallel canals and locks would be needed to meet the increasing demands of lake traffic was an immediate probability. This land was the only land available for the purpose. It included all the land between the canals in use and the bank of the river. Although it is not proper to estimate land condemned for public purposes by the public necessities or its worth to the public for such purpose, it is proper to consider the fact that the property is so situated that it will probably be desired and available for such a purpose." 229 U. S. 53, 76, 77, 57 Law. ed. 1063, 1081, 33 S. Ct. 667.

In the instant case, the defendants offered to prove that not only had the proposed use "passed beyond

the region of the purely conjectural or speculative," but that the property had been purchased by The Washington Water Power Company. This was an existing hydro-electrical company serving Eastern Washington and Northern Idaho, with ample financial backing, ready, willing and able to put the lands to power site uses. It had expended in excess of $400,000 in acquisition and development of the site. It had made arrangements for the necessary rights from the State of Washington, had pending an application with the Federal Power Commission for a license and would have been in the process of constructing the project at the time of the taking but for the condemnation.

The same Chandler-Dunbar case was relied upon by the government as authority for the proposition that no value could be allowed for power site purposes because the land was situated upon a navigable stream and the riparian owner had no title to the bed of the stream nor the flow of the river "and therefore could not recover for these rights which he did not own." The distinction as we see it is this—that the defendants do not claim any such values, but claim only the "fair market value" of the land itself as affected by the reasonable likelihood that the necessary permission to so use the land could be obtained, which value, of course, would be subject to proof and determination by a jury; that such value was allowed for the canal and locksite land in the Chandler-Dunbar case and was not allowed here.

The decision sought to be reviewed is also in conflict with the decision of this court in,

Mississippi & Rum River Boom Co. vs. Patterson, 98 U. S. 403, 25 Law ed. 206.

In that case certain islands in the Mississippi River were condemned. These islands had their greatest value as anchors for booms across the Mississippi River. The condemning company had been granted exclusive privileges to mantain a boom on the river and contended that the owner therefore could not use his property for this purpose, and therefore it had no value for such purpose. This court denied this contention and held:

> "Aside from this, we do not think that the State is precluded by anything in the charter of the Company from giving a license to the defendant in error to construct a boom near his lands. Moreover, the United States, having paramount control over the river, may grant such license if the State should refuse one. The adaptability of the lands for the purpose of a boom was, therefore, a proper element for consideration in estimating the value of the lands condemned." 98 U. S. 403, 409, 25 Law. ed. 206, 209.

The United States had not granted any such license; it might not grant it, but on the other hand it could grant it and it was reasonable to assume that it would. If such likelihood was sufficient to affect the market value, the owner was entitled to have it considered. In the case at bar the owner was denied the right to have the likelihood of his obtaining a power license considered as affecting the value of his property.

Further, the court laid down this principle:

> "In determining the value of land appropriated for public purposes, the same considerations

> are to be regarded as in a sale of property between private parties." 98 U. S. 407, 408, 25 Law. ed. 208.

This statement is in direct conflict with the holding in the decision here sought to be reviewed. It is undisputed that as between private parties this land would sell and had sold for a price in excess of its price for agricultural purposes, yet the owner was denied the right to offer evidence on this point.

Two condemnation cases decided by this court at its last term are, in our opinion, in conflict with the decision in this case. In *United States vs. Miller,* 317 U. S. 369, 87 Law. ed. (Adv.) 251, 63 S. Ct. (Adv.) 276 the court held:

> "Where, from the date of its authorization by Act of Congress, a federal reclamation project included the relocation of a line of railroad, and a probable route was marked out over certain lands subsequently taken in eminent domain proceedings, it is proper, in determining just compensation, to exclude from value as of the date of the taking such increase as occurred since the date of the authorization of the project and as a result thereof." (Syllabus, 317 U. S. 369).

The converse of this is equally true, that the owner cannot be penalized by the dimunition in the value of his land by the announced intention of the government to condemn it. Yet that is the effect of the holding in this case, because when the government elected to condemn the land, it at the same time destroyed the reasonable probability that the lands could be used for power purposes, and then acquired them

for their lessened value, tho that lessened value was produced solely as an incident of the taking.

This same principle is announced in *U. S. ex rel. Tennessee Valley Authority vs. Powelson,* 318 U. S. ....., 87 Law. ed. (Adv.) 976, where the court said:

> "The United States no more than a state can be excused from paying just compensation measured by the value of the property at the time of the taking merely because it could destroy that value by appropriate legislation or regulation."

That in substance is what is accomplished in this case. At the time the Grand Coulee project was authorized, the company was preparing to build a power project on the lands and had pending an application for a federal license, which it offered to prove would, in the natural course of events, have been granted. The government then proceeded to take the lands at a value that was based upon the assumption that the government could and would make impossible their use for power site purposes by denying the Company a license.

We further respectfully urge that certiorari should be granted because the question here involved is one of general importance, which should have an authoritative and unequivocal answer by this court. Not only are power site lands on navigable streams involved, but likewise all such riparian lands whose value depends in part on the use of the waters of the stream. May the government take riparian lands at a price which they would bring, if they were non-riparian? Or must the government pay what any other willing buyer would pay for them? The opinions of this court

all indicate the government is under the latter obligation, although no additional hyopthetical value for "water power" need be paid if it is not actually reflected in the market value of the lands. (*U. S. vs. Chandler-Dunbar Water Power Co.,* 229 U. S. 53, 57 Law. ed. 1063). Yet this holding in the Chandler-Dunbar case, which was applied correctly, we think, in the case of *Continental Land Co. vs. U. S.,* 88 Fed. (2d) 104, has now, in the opinion of petitioners, been erroneously construed and extended by the Circuit Court of Appeals for the Ninth Circuit, to mean, that no value adheres in riparian lands over and above their non-riparian uses, no matter how reasonably probable the riparian use may be, or no matter what may be the "market value fairly determined" of such lands (*U. S. ex rel. Tennessee Valley Authority vs. Powelson,* 318 U. S. ....., 87 L. ed. (Adv.) 976). Wholly aside from the manifest injustice to the defendants, which results in property being taken from it for $7,950.35 for which it paid $156,043.33 and spent $317,352.64 in actual development work, and which it could have sold for approximately one-half million dollars, the fact that hundreds of thousands of dollars invested in similar properties in the west alone, which may be affected by this ruling, make it a case in which this court should properly exercise its discretion and grant certiorari.

The United States cannot make a County party to a condemnation suit, have judgment entered on a declaration of taking granting title to realty in fee simple, and thereby escape paying the tax lien created by the Washington Statute.

The tax lien created by the Washington Statute upon the lands taken by the United States Government was a valid and existing lien under the words of the statute at the time the United States acquired the property. See Rem. Rev. Stat. 11265 (set forth in appendix). In construing that statute, Judge Schwellenbach, learned Judge of the District Court, said:

> " * * * There is no question under the statute that there is a valid lien. There is no question under the statute as between the purchaser and seller. If you acquire a property before the 15th of February, then the purchaser has to pay. * * * You are condemning property under the laws of the State of Washington and the laws of the State of Washington say if you acquire a piece of property prior to February and there are taxes due on it, taxes levied against it, that the purchaser pays the taxes, and if I go out and buy a piece of property and I buy it before the time, then I pay; if I buy it after the time, then the seller pays. * * *" (R. pp. 115, 116).

The highest Court of the State, the Washington Supreme Court, has twice construed the statute creating the lien in connection with the awards in condemnation cases. In both of those decisions, the Supreme Court of the State of Washington held that the provision of the statute, "but as between a grantor and a grantee, such liens shall not attach until the 15th day of February of the succeeding year," prevented the

lien from attaching as between condemnee and condemnor, and for that reason, where property was acquired before the designated day of the year succeeding that in which the tax was levied, taxes could not be paid out of the award. See *Bethany Presbyterian Church vs. The City of Seattle,* 154 Wash. 529, 282 Pac. 922; *State ex rel. Oregon-Washington Water Service Company vs. Hoquiam,* 155 Wash. 678, 287 Pac. 670.

The United States acquired the property with knowledge of the State law fixing the lien. The United States albeit protected with respect to proceedings against it without its consent, stands, so far as the existence of liens is concerned, in no different position from that of other purchasers of land in Washington. *United States of America vs. State of Alabama,* 313 U. S. 274, 85 Law. ed. 1327, 61 S. Ct. 1011.

The Circuit Court of Appeals took the position that the foregoing matters and things were immaterial for the reason:

> "The United States did not condemn the taxes or the lien therefor. It condemned the land. It is required to pay only just compensation for that land. The fact that the land may be subject to a lien has no bearing on the condemnation. It is generally held that so far as the lien is concerned the award stands in the place of the property." (R. p. 337), 135 Fed. (2d) 541.

We respectfully submit that in the opinion of petitioners herein the effect of such holding is to permit the United States to acquire title in fee simple to property in the State of Washington without discharg-

ing tax liens by the simple device of making counties parties to condemnation proceedings. While we might not be correct in asserting that in so holding, the learned Circuit Court of Appeals has so far departed from the accepted judicial course of proceedings as to call for an exercise of this Court's power of supervision, we respectfully state that in the opinion of petitioners, this question is of sufficient public importance to justify the issuance by this Court of the writ herein sought.

CONCLUSION

The questions which this application suggest should be definitely settled by this Court. These questions are

present in a large number of cases and involve considerable moneys.

Respectfully submitted,

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